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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 191

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,

v.

PANOMA CORPORATION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1

Table of Cases Cited

Cities Service Gas Co. v. *Peerless Oil & Gas Co., et al.*, 203 Okl. 35, 220 P.(2d) 279	2
Cities Service Gas Co. v. *Peerless Oil & Gas Co., et al.*, 340 U.S. 179	2, 3
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591	11
Federal Power Commission v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498	9
Interstate Natural Gas Co. v. *Federal Power Commission*, 331 U.S. 682	10
Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 74 S.Ct. 396	12
Minneapolis, St. Paul & S.M.R. Co. v. *C. L. Merrick Co.*, 254 U.S. 376	4
Phillips Petroleum Co. v. *State of Oklahoma*, 340 U.S. 190	6
Phillips Petroleum Co. v. *State of Wisconsin*, 74 S.Ct. 795	12
Southwestern Bell Tel. Co. v. *State of Oklahoma*, 303 U.S. 206	2

Authorities Cited

Orders of the State Corporation Commission of Oklahoma:	
No. 19514	2, 3, 6, 8
No. 19515	2
No. 19702	6
No. 24745	5

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APPEAL FROM THE SUPREME COURT OF OKLAHOMA

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM IN ACCORDANCE WITH THE PROVISICNS OF RULE 12, PARAGRAPH 3 OF THE SUPREME COURT OF THE UNITED STATES, AS AMENDED

Leave is hereby granted to file this 30th day of June, 1954.

HARRY L. S. HALLEY,
Chief Justice.

Come now appellees and file their statement in opposition to appellant's statement as to jurisdiction, and hereby move the court to dismiss the appeal herein, or to affirm the decision and judgment of the Supreme Court of the

State of Oklahoma from which decision and judgment said appeal is taken.

I

The opinion of the Supreme Court of Oklahoma, attached to appellant's statement as appendix A, affirmatively discloses that previously the State Corporation Commission of the State of Oklahoma by its orders numbered 19514 and 19515 fixed the minimum price of gas at 7¢ per thousand cubic feet at the wellhead for all natural gas taken from the producing structures or formations of the field involved. That these orders were upheld by the Supreme Court of Oklahoma and by the Supreme Court of the United States in 1950, *Cities Service Gas Co.* v. *Peerless Oil & Gas Co. et al.*, 203 Okl. 35, 220 P. 2d 279; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co. et al.*, 340 U. S. 179, and that thus since the effective date of the orders, that is, January, 1947, no one could legally take natural gas from the field at a price less than 7¢ at the wellhead.

The opinion affirmatively discloses that the contract between Natural and Panoma, although executed prior to the date of the Commission's order, was specifically subject to the lawful orders of all regulatory bodies having jurisdiction of the parties.

The opinion further discloses that there was not decided, nor was it necessary to decide any federal question in the consideration of the cause other than a proper enforcement of the order of the State Corporation Commission in accordance with the opinion of the Supreme Court of the United States in affirming the order by its decision in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., supra.*

In *Southwestern Bell Tel. Co.* v. *State of Oklahoma*, 303 U. S. 206, in a per curiam opinion, it is said:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a

court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234, 8 S. Ct. 1053, 32 L. Ed. 125; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307, 11 S. Ct. 111, 34 L. Ed. 683; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297, S. Ct. 528, 35 L. Ed. 193; *Whitney* v. *California*, 274 U. S. 357, 360, 361, 47 S. Ct. 641, 642, 643, 71 L. Ed. 1095; *Lynch* v. *New York*, 293 U. S. 52, 54, 55 S. Ct. 16, 17, 79 L. Ed. 191."

The validity of Order No. 19514 of the Corporation Commission of the State of Oklahoma, referred to by appellant as the basic order, is not involved in this appeal. In the opinion sustaining that order and affirming the Supreme Court of the State of Oklahoma and the Corporation Commission of the State of Oklahoma in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, Mr. Justice Clark said:

"* * * The Oklahoma Supreme Court construed the 1915 Act to permit the general order setting a minimum price in the field. It further rules that economic waste was within the contemplation of the statute. Finally, with regard to state questions, it held that the orders did not violate the Oklahoma Constitution.

"The Oklahoma court also concluded that the statutes so construed and the orders made thereunder do not violate the Federal Constitution on the grounds relied on by Cities Service. We agree.

"The Due Process and Equal Protection issues raised by appellant are virtually without substance. It is now undeniable that a state may adopt reasonable reg-

ulations to prevent economic and physical waste of natural gas. * * *

"* * * It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. (Citing cases) The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. * * *

"That a legitimate local interest is at stake in this case is clear. A state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources. The contention urged by appellant that a group of private producers and royalty owners derive substantial gain from the regulations does not contradict the established connection between the orders and a state-wide interest in conservation * * *

"* * * Presumably all consumers, domestic and industrial alike, want to obtain natural gas as cheaply as possible. On the other hand, groups connected with the production and transportation of competing fuels complain of the competition of cheap gas. Moreover, the wellhead price of gas is but a fraction of the price paid by domestic consumers at the burner-tip, so that the field price as herein set may have little or no effect on the domestic delivered price. * * *

"We hold that on this record the Oklahoma Corporation Commission issued valid orders, and that the decision of the court below should be affirmed."

It has been conclusively settled by the United States Supreme Court, and is no longer open for review by this court.

Minneapolis, St. Paul & S. M. R. Co. v. *C. L. Merrick Co.*, 254 U. S. 376.

II

This appeal is concerned only with the validity of Order No. 24745 of the Corporation Commission of the State of Oklahoma attached to appellant's statement as appendix D, and is as follows:

> "It is therefore ordered by the Corporation Commission of Oklahoma as follows:
>
> "1. That Natural Gas Pipeline Company of America is granted 20 days from date hereof in which to comply with Order No. 19514 by paying unto Panoma Corporation the difference between the amount which it has paid Panoma Corporation and the amount Panoma Corporation was entitled to receive for gas heretofore delivered and paid for at a lesser price, so that the total amount paid for gas delivered during the period covered by such payments will equal 7¢ per thousand cubic feet for the amount of gas delivered to said compressor station, and measured at a pressure base of 14.65 pounds absolute pressure per square inch, and if it does not so do within such time, Panoma Corporation is directed to forthwith cease delivering gas to Natural Gas Pipeline Company of America.
>
> "2. That Natural Gas Pipeline Company of America does not comply with Order No. 19514 by paying to Panoma Corporation 6¢ per thousand cubic feet of gas, for a part of the gas delivered, measured at a pressure base 16.5 pounds per square inch absolute pressure, and it is directed to desist from so doing and is directed to comply with said order.
>
> "3. That Natural Gas Pipeline Company of America shall pay Panoma Corporation for the gas delivered to its compressor station, the sum of 7¢ per thousand cubic feet, measured at a pressure base of 16.5 pounds absolute per square inch. In the event of its failure to do so, Panoma Corporation is ordered to stop delivery of gas to Natural Gas Pipeline Company of America."

The enforcement provisions are directed to Panoma. It is in the nature of a citation after final judgment for the enforcement of Order No. 19514 and for noncompliance required Panoma to stop delivery of gas to Natural.

In its statement appellant attempts to compare the effect of the enforcement of the basic order as against Phillips Petroleum Company and the effect of the enforcement of the basic order as against Panoma by showing the net receipts for gas produced by Phillips and the net receipts from gas produced by Panoma.

The enforcement provisions of the basic order as applied to Phillips are not within the record of this appeal and may not be considered herein. As shown by this court's opinion in the consideration of Order No. 19702 of the Corporation Commission of the State of Oklahoma in *Phillips Petroleum Company* v. *State of Oklahoma*, 340 U. S. 190, it was found that Phillips was complying with the basic order. Phillips therein contended that it was not a purchaser but merely a producer, and that unlike the situation in Cities Service, the order as applied to it lacks any connection with the correlative rights, the interest of the public, monopolistic practices or discrimination. This court said:

> "* * * The distinction is without a difference: the connection between realized price and conservation applies to all production in the field, whether owners purchase from others or not, and whether they own pipe lines or not. In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any."

Contrary to the contention of appellants, the Corporation made no finding that the sales contract between Panoma and its purchasers was substantially identical with the contract between Phillips and its purchasers, nor did the

Commission make a finding as to the aggregate receipts by either Panoma or Phillips from the sale of gas.

Paragraph 10 of the Commission's order, (shown as appendix D attached to appellant's statement) is as follows:

> "The Commission further finds that Order No. 19702, entered upon the application of Phillips Petroleum Company, was not entered as a fieldwide order, but was entered as affecting a part thereof only and on the application of an owner of a portion of the wells in the field, and was based on facts presented to the Commission in support of the special relief or exception which the applicant in that case had requested; that therein the Commission specifically found that applicant 'did not see fit to introduce any evidence as to profit or losses from the production of natural gas from the Guymon-Hugoton Field'; that this Commission does not feel it is bound herein by any determination of facts or any order entered therein; that this Commission is not required herein to vacate, modify or interpret Order No. 19702; however since respondent's contention that such order is in conflict with the findings and judgment of the Commission herein, this Commission deems it appropriate to now find that when it entered its Order No. 19514 determining:
>
> > 'That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field in Texas County, Oklahoma, at a price at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch',
>
> that it applied to all producers, purchasers and takers of gas from said field, and that no sales or purchases of natural gas would be thereafter permitted in the Guymon-Hugoton field at a price of less than 7¢ per thousand cubic feet, measured at a pressure base of 14.65 pounds absolute per square inch; that the minimum price thus established would govern at the well-

> head and at any other point in said Guymon-Hugoton field at which said gas would thereafter be delivered by a producer to a purchaser, so that the owners of the gas within said reservoir, being the lessees and the lessors, and other persons owning an interest in the gas in place, would at all times from and after the issuance of said order, receive from the delivery of their gas, as owners and producers thereof, not less than the minimum price fixed by the Commission."

The order appealed from makes no reference to any sum of money so paid by Natural to Panoma. It simply requires payment of the minimum price of gas from and after the effective date of basic order No. 19514.

The Due Process clause in the Constitution has no application whatsoever. Ample opportunity is afforded for a judicial review of the orders of the Oklahoma State Corporation Commission. As said in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., supra,* the Due Process and Equal Protection issues raised by appellant are virtually without substance.

Panoma receives no windfall. It receives exactly what the Commission's order provides or shuts in its wells. This question was foreclosed by *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., supra,* wherein it is said:

> "The contention urged by appellant that a group of private producers and royalty owners derive substantial gain from the regulations does not contradict the established connection between the orders and a statewide interest in conservation."

The Commerce Clause does not prevent or restrict the state from regulating the production of gas to prevent waste and conserve the natural resources. The Natural Gas Act was created for the purpose of filling a void in the usual and customary regulations. Interstate pipeline companies

were successful in obtaining court decisions holding that certain of their activities, by reason of the Commerce Clause, were beyond state regulation, and since no federal regulation existed, they were free to act as they chose. Mr. Justice Reed in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, makes these statements:

> "Without entering upon another review of its legislative history, suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies."

And in the same opinion:

> "Before the Colorado Interstate decision, it was apparent that the value of producing facilities and the cost of gas bought by a natural-gas company from producers would be weighty factors in rate making whether a rate-base method or other method for fixing rates was used. Low valuation by the Commission of producing properties or low-cost allowance for purchased gas discourages exploration for gas or its sale in interstate commerce. Congress knew this necessary relationship between production and distribution but excluded the Commission from exercising any direct control or regulation over the actual production and gathering of natural gas."

And in answer to the argument that since natural gas is the life blood of a pipeline system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service, and consequently

abandon its facilities and services without the consent of the Commission, this Court in the same opinion said:

> "The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission.'
>
> "To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress. The Legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures, in the interests of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other. Congress enacted this Act after full consideration of the problems of production and distribution, national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views."

In *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, Mr. Chief Justice Vinson said:

> "Thus the House Committee Report states: 'The bill takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority. * * *' Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of

natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach."

In *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, Mr. Justice Douglas, speaking for the court, said:

"We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over 'the production or gathering of natural gas.' Sec. 1(b). In addition, Congress recognized the legitimate interests of the States in the conservation of natural gas. By Sec. 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas. The Commission was also directed to recommend further legislation appropriate or necessary to carry out any proposed compact and 'to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.' Sec. 11(a) Thus Congress was quite aware of the interests of the producing states in their natural gas supplies. But it left the protection of those interests to measures other than the maintenance of high rates to private companies."

Appellant contends that this line of authorities was superseded by this court's decisions in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 74 S. Ct. Rep. 396 and *Phillips Petroleum Company* v. *State of Wisconsin*, 74 S. Ct. Rep. 795. Not so. *Michigan-Wisconsin Pipe Line Company* v. *Calvert* was concerned with a state tax applied to an interstate natural gas pipe line company engaged in interstate commerce. *Phillips Petroleum Company* v. *State of Wisconsin* was concerned with whether or not Phillips Petroleum Company is a natural gas company within the jurisdiction of the Federal Power Commission. In that opinion Mr. Justice Minton, speaking for the court, said:

> "There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business. A significant part of this gap was created by cases holding that 'the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States.' Interstate Natural Gas Co. v. Federal Power Commission, supra, 331 U. S. at page 689, 67 S. Ct. at page 1487. The committee reports on the bill that because the Natural Gas Act specifically referred to two of these cases and to the necessity of federal regulation to occupy the hiatus created by them. Thus, we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission system.
>
> "Petitioners cite our recent decisions in Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U. S. 179, 71 S. Ct. 215, 95 L. Ed. 190, and Phillips Petroleum Co. v. State of Oklahoma, 340 U. S. 190, 71 S. Ct. 221, 95 L. Ed. 204, as authority for the proposition that the states may regulate the sales in question here and, hence, that such sales are not within the gap which the

> Natural Gas Act was intended to fill. Those cases upheld as constitutional state minimum price orders, justified as conservation measures, applying to sales of natural gas in interstate commerce. But it is well settled that the gap referred to is that thought to exist at the time the Natural Gas Act was passed, and the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce, in the absence of conflicting federal regulation."

The emphasis on the word "minimum" is the court's. The Federal Power Commission has in no wise attempted to regulate the production and gathering of natural gas. As seen by the decisions of this court, supra, such is beyond the jurisdiction of the Federal Power Commission.

The decisions make it clearly apparent that we have two types of regulation, each covering its separate field. First, state regulation covering the production and gathering of natural gas. This is done tc effect conservation and to eliminate waste; fixing minimum prices is within this power left to the states.

Second, regulation of the transportation and sale of natural gas, including its sale price to consumers throughout the United States is within the province and jurisdiction of the Federal Power Commission.

The Commerce Clause of the Constitution does not prohibit the state regulation of its gas fields in so far as the regulations cover the production of gas.

IV

Appellees contend that the record in this case discloses no substantial federal question, and therefore this court is without jurisdiction of this cause. It is therefore submitted that appellees' motion herein to dismiss the appeal

or affirm the judgment of the Supreme Court of Oklahoma should be granted.

WHEREFORE, appellees pray that this court refuse to note jurisdiction in this cause and that appellees' motion to dismiss the appeal or affirm the judgment be granted.

Respectfully submitted,

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